A **ANNANTAN SUBRAMANIAM**

v.

PP

B HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL APPEAL NO: 42-18-2006]
1 SEPTEMBER 2006

C ***CRIMINAL PROCEDURE:*** *Sentence - Appeal against - Offences under ss. 376 and 326 Penal Code - Rape and causing grievous hurt - Cumulative sentences - Whether should have been passed - Whether there were extenuating circumstances - Whether right and proper case to vary effective sentence to maximum*

D The appellant pleaded guilty to the offence of rape under s. 376 Penal Code (first offence) and for voluntarily causing grievous hurt to the victim under s. 326 of the same (second offence). This was the appellant's appeal against the sentences of 16 years
E imprisonment and 12 strokes of the cane for the first offence and eight years imprisonment and eight strokes of the cane for the second offence, both sentences to run consecutively, that the trial court had handed down. The appellant argued his own appeal and pleaded for a reduction in the terms of imprisonment and for the
F sentences to take concurrent effect. The deputy public prosecutor contended that two separate offences were committed and asked for the sentences to be affirmed.

Held:

G **(1)** The totality principle was considered, but it begged the question as to whether the 'one transaction rule' was considered or properly considered by the trial court. The admitted facts were that the appellant, after raping the victim, had stabbed her. Two offences were committed. The second
H offence was committed after the commission of the first offence. Hence there were two separate and distinct offences. But with respect, the test was not whether the offences were committed in the course of a single transaction. The facts, as stated in the charges and as admitted by the appellant, clearly
I bore out that the second offence was committed at about the same time and definitely at the same place as the first offence. Both offences were clearly connected by proximity of time and place. There was also continuity of action. What was not

clear was only the continuity of purpose or design. Still it was not clearcut that the offences taken together constituted more than a single invasion. The victim was first forcibly abducted at knife point and then forcibly raped. More than not, it would seem that both offences were committed under the same set of facts and circumstances. Under the circumstances, cumulative sentences should not have been passed. (para 12)

(2) In relation to the individual sentences, there was no error. The plea in mitigation and all factors of the case and the public interest were all properly taken into account by the trial court. The individual sentences were not manifestly excessive. But given that consecutive sentences could not be upheld, concurrent sentences could mean that the appellant would only serve a total of 16 years imprisonment. It would be an understatement to say that the appellant had committed a serious crime. The appellant first forcibly abducted and then raped the victim. And having gratified his lust, the appellant then gravely injured the victim. There were no extenuating circumstances. It was all evil intent. Sixteen years imprisonment would not reflect the criminal behaviour of the appellant as a whole. The effective sentence should not remain unchanged. This was the right and proper case to vary the effective sentence to the maximum. (para 13)

(3) The term of imprisonment for the first offence be varied from 16 years to 20 years, and that sentences be concurrent sentences; and all other orders or directions of the trial court remain unaffected. (para 14)

[Order accordingly.]

Case(s) referred to:
Amrita Lal Hazra v. Emperor 42 Cal 957 ***(refd)***
Ang Chai Seng v. PP [2000] 1 CLJ 213 CA ***(refd)***
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
Bhandulananda Javatilake v. PP [1982] 1 MLJ 83 ***(refd)***
Brown v. Lynch [1982] 5 Aust Crim R 404 ***(refd)***
Charmaine Rose v. Scott Anthony Tilyard [1989] Tas Lexis 1868 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
R v. Kenneth John Ball 35 Cr App R 164 ***(refd)***

Other source(s) referred to:
Fox and Freiberg, *Sentencing – State and Federal Law in Victoria*, p 368
Tan Kee Heng, *Civil and Criminal Appeals in Malaysia*, pp 191-192
Thomas, Principles of Sentencing, 2nd edn, p 53

Appellant in person
For the respondent - Wirna Ripin, A-G's Chambers

Reported by Suhainah Wahiduddin

JUDGMENT

Jeffrey Tan J:

[1] In the trial court, the appellant pleaded guilty to the following 2 offences.

First Charge

Bahawa kamu pada 2.11.2005 jam lebih kurang 1.00 pagi hingga 11.00 pagi, bertempat di Ladang Kelapa Sawit Bukit Belading, Bekoh, Tangkak, di dalam Daerah Muar di dalam Negeri Johor, telah merogol seorang bernama Nik Zainab bte Othman KPT 851024-03-6346 umur 20 tahun, dari itu kamu telah melakukan satu kesalahan di bawah Seksyen 376 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

Second Charge

Bahawa kamu pada 2.11.2005 jam lebih kurang 1.00 pagi hingga 11.00 pagi, bertempat di Ladang Kelapa Sawit Bukit Belading, Bekoh, Tangkak, di dalam Daerah Muar di dalam Negeri Johor dengan sengaja mendatangkan cedera parah kepada seorang bernama Nik Zainab bte Othman KPT 851024-03-6346 dengan sebilah pisau jenis Rambo, yang mana senjata itu digunakan untuk menikam, dari itu kamu telah melakukan satu kesalahan di bawah Seksyen 326 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[2] This is the appellant's appeal against the sentences of 16 years imprisonment and 12 strokes of the cane for the 1st offence and 8 years imprisonment and 8 strokes of the cane for the 2nd offence, both sentences to run consecutively that the trial court handed down on 7 June 2006.

[3] The appellant argued his own appeal. He pleaded for a reduction in the terms of imprisonment and for the sentences to take concurrent effect. He said he was 21 but was 20 when he committed the offences. The learned Deputy Public Prosecutor, Wirna bte Ripin, contended that 2 separate offences were committed, and asked for the sentences to be affirmed.

[4] In relation to an appeal against sentence, "... the appellate court is ready to interfere with the sentence imposed by the trial court upon proof of one or more of the following circumstances: (a) The sentence imposed by the trial court was manifestly excessive or inadequate. (b) There is a manifest error either in law or in considering the facts and circumstances of the case. (c) The sentence passed by the trial court is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. (d) The trial court has given undue weight to some of the evidence. (e) The trial court, in fixing the sentence, had failed to adequately consider all the relevant factors either for or against the offender. (f) The sentence was wrong in law. (g) The unsatisfactory features of the proceedings in the lower court. (h) The charge has been hanging over the accused's head for a considerable period. (i) Justice does not appear to have been done." (*Civil and Criminal Appeals in Malaysia* by Tan Kee Heng at 191-192). Still it is "a firmly established principle that an appellate court would be slow to disturb the sentence imposed by the lower courts unless the sentence is excessive to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles then this court will intervene (*R v. Kenneth John Ball* 35 Cr App R 164). According to Hashim Yeop Sani J (as he then was) in *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 at p 257G: 'It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence'" (see *Ang Chai Seng v. PP* [2000] 1 CLJ 213 per Haidar JCA, as he then was). And the Court of Appeal in *Ang Chai Seng* reiterated what was said by Federal Court in *Bhandulananda Javatilake v. PP* [1982] 1 MLJ 83, at p. 84:

> ... this court has said it again and again that it will not normally interfere with sentences, and the probability or even the possibility, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference. For a discretionary judgment of this kind to be reversed by this court,

A it must be shown to our satisfaction that the learned judge was embarking on some unauthorized or extraneous or irrelevant exercise of discretion.

[5] In *Bhandulananda Jayatilake*, the Federal Court per Raja Azlan Shah Ag LP (as HRH then was) imparted the following guide:

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> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence
> C so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing
> D opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v. Jamieson* ([1952] AC 525)). It is for that reason that some very
> E conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others, equally conscientious, have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again it
> F will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient *per se* to warrant this court's interference.

G **[6]** The latter is still the guide to follow (see *Dato' Seri Anwar bin Ibrahim* [2002] 3 CLJ 457, where the Federal Court expressed its full agreement with *Bhandulananda Jayatilake*).

[7] On the matter of whether sentences should be ordered to run concurrently or consecutively, the Court of Appeal per
H Augustine Paul JCA, as he then was, in *Bachik bin Abdul Rahman v. Public Prosecutor* [2004] 2 CLJ 572, explained that the court would be guided by the one transaction rule and the totality principle:

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> The combined effect of s. 282 and s. 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see *Ooi Sim Yim v. Public Prosecutor* [1990] 1 MLJ 88). The exercise of the discretion

to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v. Saleem* [1964] Crim LR 482; *R v. Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v. PP* [1979] 2 MLJ 88; *Amrita Lal Hazra v. Emperor* 42 Cal 957; *Chin Choy v. PP* [1955] MLJ 236). The rule, however, is not absolute. As Yong Rung How CJ said in *Kanagasuntharam v. PP* [1992] 1 SLR 81 at p 83:

> The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v. Faulkner* [1972] 56 Cr App R 594, *R v. Wheatley* [1983] 5 Cr App R (S) 417 and *R v. Skinner* [1986] 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentence may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.

In explaining the totality principle his Lordship referred (at p 85) to the view of DA Thomas in *Principles of Sentencing,* (2nd Edn) at pp 57-58:

> The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender a 'crushing sentence' not in keeping with his record and prospects.

In this regard reference is also made to *Emmins on Sentencing* (2nd Edn), p 151:

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> It is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour.

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There will be cases properly described as crushing the hope in the offender of reformation and a return to a desirable life but in which the offender has, by his criminal acts, forfeited any right to have his sentence reduced on that account (see *Crowley and Garner v. R* [1991] 55 A Crim R 201). As O'Bryan J said in *Vitos v. R*

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[1981] 4 A Grim R 238 at p 301:

> I have some difficulty appreciating the concept that a richly deserved sentence, not manifestly excessive, should be disturbed because the person upon whom the sentence is imposed may feel crushed by it. It is quite true that the

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> applicant has to face a very long term of imprisonment before he will be released and because he is a comparatively young man, many of the best years of his life will be spent in custody. However, from the community point of view, his detention for a very substantial period is necessary to protect females from his criminal behaviour.

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Yong CJ said in that case that the question of whether the sentence imposed is crushing cannot be answered mathematically by reference to the offender's age and the length of sentence to be served by the circumstances of the case.

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[8] In Fox and Freiberg, *Sentencing – State and Federal Law in Victoria*, at 368, the learned authors said: "It is generally accepted that when a number of offences arise out of substantially the same act, circumstances, or series of occurrences, concurrent sentences should be imposed. This so-called 'continuing episode' or 'one

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transaction' rule has no easy definition." Indeed, in *Amrita Lal Hazra v. Emperor* 42 Cal 957, 983, which laid down the test, it was said that there is no comprehensive formula:

> It is not possible to frame a comprehensive formula of universal

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> application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design.

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[9] It is however definitive that "where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than

consecutive" (*Thomas, Principles of Sentencing*, 2nd edn at 53). "The essence of the one transaction rule appears to be that consecutive sentences are inappropriate when ail the offences taken together constitute a single invasion of the same legally protected interest. The principle applies when two or more offences arise from the facts as when the same series of blows constitutes assault occasioning actual bodily harm and wilful treatment of a child or malicious wounding and indecent assault" (*Thomas, Principles of Sentencing*, 2nd edn at 53). In *Brown v. Lynch* [1982] 5 Aust Crim R 404, 407, Forster CJ said: "... it has been held that, save in special circumstances, when a number of offences arise from substantially the same act or circumstances or a closely related series of occurrences, cumulative penalties should not be imposed ..."

[10] "The overall effect of both principles requires an appeal court to consider all the penalties imposed and the totality of the unlawful conduct involved to see whether, in the end result, the sentence or series of sentences is manifestly excessive" (*Charmaine Rose v. Scott Anthony Tilyard* [1989] TAS LEXIS 1868 per Underwood J). "The court sometimes upholds consecutive sentences which appear to offend the (one transaction rule) on the ground that the totality of the sentence, is correct and that no purpose would be served in making a formal variation which would leave the effective sentence unchanged, and from time to time varies a sentence with reference to the single transaction principle' when that principle does not appear to have been infringed and the real ground of the reduction is that the totality of the sentence is excessive" (*Thomas, Principles of Sentencing,* 2nd edn at 53).

[11] In the instant case, the trial court held that the 2nd offence was committed after the commission of the 1st offence and was therefore a separate and distinct offence that warranted a separate and distinct sentence to be served – "Mahkamah mengarahkan hukuman penjara bagi kesalahan rogol berjalan berasingan dengan hukuman penjara bagi kesalahan mendatangkan cedera parah kerana kesalahan mendatangkan cedera parah ini telah dilakukan oleh OKT ke atas mangsa selepas OKT merogol mangsa, suatu kesalahan berasingan dan tersendiri, yang mewajarkan suatu hukuman yang perlu dijalani oleh OKT secara berasingan dan tersendiri" (see p. 19 of the appeal record). No other ground was given by the trial court to justify the direction on the commencement of the sentences.

[12] The totality principle was considered, but it begs the question as to whether the 'one transaction rule' was considered or properly considered by the trial court. The admitted facts were that the appellant "setelah merogol ... telah menikam perut, serta leher mangsa dikelar". 2 offences were committed. The 2nd offence was committed after the commission of the 1st offence. It was held that the 2nd offence was committed after the 1st offence and that hence there were 2 separate and distinct offences. But with respect, the test is not whether the offences were committed one after the other, but whether the offences were committed in the course of a single transaction. The facts, as stated in the charges and as admitted by the appellant, clearly bore out that the 2nd offence was committed at about the same time and definitely at the same place as the 1st offence. Both offences were clearly connected by proximity of time and place. There was also continuity of action. What was not clear was only the continuity of purpose or design. Still it was not clear-cut that the offences taken together constituted more than a single invasion. The victim was first forcibly abducted at knife point and then forcibly raped. More than not, it would seem that both offences were committed under the same set of facts and circumstances. Under the circumstances, cumulative sentences should not have been passed.

[13] In relation to the individual sentences, there was no error. The plea in mitigation and all factors of the case and the public interest were all properly taken into account by the trial court. The individual sentences were not manifestly excessive. But given that consecutive sentences could not be upheld, concurrent sentences could mean that the appellant would only serve a total of 16 years imprisonment. It would be an understatement to say that the appellant had committed a serious crime. The appellant first forcibly abducted and then raped the victim. And having gratified his lust, the appellant then gravely injured the victim. There were no extenuating circumstances. It was all evil intent. 16 years imprisonment would not reflect the criminal behaviour of the appellant as a whole. The effective sentence should not remain unchanged. This is the right and proper case to vary the effective sentence to the maximum.

[14] For those reasons, it is hereby ordered that the term of imprisonment for the 1st offence be varied from 16 years to 20 years, and that the sentences be concurrent sentences; all other orders or directions of the trial court remain unaffected.